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In the Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF
TERRY DON PETTY
Debtor

LUCY M. CIMO, WIDOW OF HENRY J. CIMO, ET AL
Petitioners

VERSUS

TERRY DON PETTY, AND M & M PARTNERSHIP,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a dismissal of a Chapter 11 bankruptcy proceeding, terminating the Bankruptcy Court's jurisdiction over the case, effectively moot a pending motion to invoke automatic rejection under 11 U.S.C. 365(d)(4), and did the Bankruptcy Court lack jurisdiction to enter an order denying the said motion that had been signed but not entered under Bankruptcy Court Rule 9021, prior to the dismissal of the Chapter 11 bankruptcy proceeding?

2. Should Rule 58 of the Federal Rules of Civil Procedure and Bankruptcy Rule 9021 on the entry of judgments be mechanically applied to preclude the Petitioners' appeal of the denial of their Motion to Invoke Automatic Rejection and Have an Unexpired Non-Residential Lease Deemed Rejected, Pursuant to 11 U.S.C. §365(d)(4), in contravention of this Honorable Court's holding in *Bankers Trust Company v. Mallis,* 435 U.S. 381, 98 S.Ct 1117, 55 L.Ed. 2d 357 (1978), because the dismissal of this bankruptcy was entered prior to the entry of the order denying the Petitioners' motion, although the order was signed prior to the entry of the dismissal?

3. Does a dismissal pursuant to 11 U.S.C. §349 nullify the effect of the automatic rejection provision of 11 U.S.C. §365(d)(4), which effects a divestiture of a debtor's interest in a lease of non-residential real property by operation of law unless assumed as provided for under 11 U.S.C. §365(d)(4)?

4. Does a Bankruptcy Court have continuing jurisdiction over a pending Motion to Invoke Automatic Rejection pursuant to 11 U.S.C. §365(d)(4) following the dismissal of a Bankruptcy proceeding?

LIST OF PARTIES

The petitioners are Lucy M. Cimo, widow of Henry J. Cimo, Joseph H. Cimo, Laura Cimo Russo, Lawrence H. Cimo, Kathleen Cimo Guidry Aultman and Arleen Cimo Miller ("Cimos" or "Petitioners"), who are the owners of the real property located at 520 St. Philip Street in New Orleans, Louisiana, which was under an assignment of a lease to respondent, and debtor, Terry Don Petty.

Respondent, Terry Don Petty ("Petty" or "Debtor" or "Respondent"), was the debtor in the bankruptcy proceeding below out of which arose the present case.

Also named as a respondent herein in M & M Partnership ("M & M" or "Respondent"), a partnership organized under the laws of Louisiana, which had been a previous assignee of the subject lease, which was assigned to the respondent, Terry Don Petty, and ultimately reassigned to respondent, M & M Partnership, following the dismissal of these bankruptcy proceedings.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lucy M. Cimo, Widow of Henry J. Cimo, et al ("Petitioners" or "Cimos") petition this Honorable Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Unites States Court of Appeals for the Fifth Circuit, reported at 848 F.2d 654 (5th Cir. 1988), is set forth in the Appendix ("A.____") at A.1 to A.4. The order denying the Cimos' petition for panel rehearing is set forth in the Appendix at A.5. The Order and Reasons of the United States District Court for the Eastern District of Louisiana is set forth in the Appendix at A.7 to A.11. The ruling by the District Court on the Motion to Dismiss the

Appeal by M & M Partnership is set forth in the Appendix at A.12. The Order of the Bankruptcy Court denying the Cimos' motion is set forth in the Appendix at A.14.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit in this matter was rendered on July 7, 1988. A timely Petition for Panel Rehearing was denied on August 10, 1988. The jurisdiction of this Honorable Court for review of the decision of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

* * *

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. amend. V which provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law... .

2. 11 U.S.C. §365(d)(4) which provides:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the Trustee does not assume or reject an unexpired lease of non-residential real property under which the debtor is a lessee within sixty (60) days after the date of the order for relief, or within such additional time as the Court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the Trustee shall immediately surrender

such non-residential real property to the lessor.

3. Bankruptcy Rule 9021 which provides:

> Except as otherwise provided herein, Rule 58 F.R. Civ. P. applies in cases under the Code. A judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) F.R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

4. Rule 58 of the Federal Rules of Civil Procedure which provides:

> Subject to the provisions of Rule 54 (b): (1) upon a general verdict of a jury, or upon a decision by the Court that a party shall recover only a sum certain or cost or that all relief shall be denied, the Clerk, unless the Court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the Court; (2) upon a decision by the Court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the Court shall properly approve the form of the judgment, and the Clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the Court, and these direc-

tions shall be given as a matter of course.

5. 11 U.S.C. §349(b) which provides:

(b) Unless the Court, for cause, orders otherwise, a dismissal of the case other than under §742 of this title -

1) Reinstates -

A) Any proceeding or custodianship superceded under §543 of this title;

B) Any transfer awarded under §522, 544, 545, 547, 548, 549, or 724(a) of this title, are preserved under §510(c)(2), §522(i)(2), or §551 of this title; and

C) Any lien voided under §506(d) of this title;

2) Vacates any order, judgment or transfer ordered under §522(i)(1), 542, 550, or 553 of this title; and

3) Revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

* * * *

STATEMENT OF THE CASE

I.

THE PARTIES AND THE PROCEEDINGS IN THE UNITED STATES BANKRUPTCY COURT

The respondent herein, Terry Don Petty, instituted bankruptcy proceedings in the United States Bankruptcy Court for the Eastern District of Louisiana on September 17, 1985, by filing a Petition for Relief under Chapter 13 of the United States Bankruptcy Code. On October 16, 1985, Petty's bankruptcy was coverted to a proceeding under Chapter 11 upon the motion of the dobtor. Petty's scheduled assets included a lease of rental apartments located at 520 St. Philip Street, New Orleans, Louisiana and owned by the petitioners. At the time of the institution of Petty's bankruptcy proceedings, Petty was a named defendant in a pending state court suit to cancel the lease of the real property located at 520 St. Philip Street, New Orleans, Louisiana filed by the Cimos, as owners and lessors of the subject real property on February 17, 1983 in the Civil District Court of Orleans Parish, State of Louisiana, styled "Cimo v. Peacock and Fenasci, et al", Case No. 83-2749 Division "H". The lease of this property was initially granted on August 20, 1973 by the Cimos to Ray Peacock and John Fenasci, as lessees. These original lessees assigned the lease to Donald Moffatt and Nancy and Durel Matherne, Jr., the principals of respondent, M & M Partnership. Subsequently, Moffatt and the Mathernes assigned the lease to Gregory Fuselier, who thereafter assigned the lease to respondent, Terry Don Petty, prior to his initiating the instant bankruptcy proceedings.

As lessors of the subject real property, the Cimos filed in the Bankruptcy Court on January 13, 1986 a motion to lift the automatic stay attendant to Petty's bankruptcy

proceeding in order to proceed with the state court litigation and/or for adequate protection. In the same pleading, the Cimos also included a Motion to Invoke Automatic Rejection and Have an Unexpired Non-Residential Lease Deemed Rejected pursuant to 11 U.S.C. §365(d)(4) (hereinafter "Motion to Invoke Automatic Rejection"). The Cimos requested therein that the Bankruptcy Court declare the subject lease of 520 St. Philip Street deemed automatically rejected. The relief requested in the Cimos' motion in Paragraph XIV was predicated upon the allegation that the leased premises constituted non-residential real property, and that"...the debtor has not assumed the lease within sixty (60) days after the date of the order for relief, or within any additional time fixed by the Court, for cause, within such 60-day period" as mandated by 11 U.S.C. §365(d)(4). The Cimos' Motions to Lift Stay and to Invoke Automatic Rejection were set for hearing on February 12, 1986. Petty responded to the Cimos' motion by filing with M & M a Joint Motion to Allow the Debtor to Assume and Assign Executory Contract and Application to Sell Leaseholder's Interest, in order to assume the lease and assign the lease to respondent, M & M Partnership. The hearing on the Cimos' motions was continued after the filing of the above mentioned joint motion and after various delays the parties' motions were reset for hearing on April 14, 1986.

On April 14, 1986, the Bankruptcy Court held a hearing on the merits of the Cimos' Motion to Lift Stay and to Invoke Automatic Rejection and on the Joint Motion of the respondents. The bankruptcy Court appeared at that time to reject Petty's argument that the lease of the property, an apartment complex, was a lease of residential real property. The Court, however, took the motions under advisement. Subsequently, on April 22, 1986 Petty filed a Supplemental Memorandum in Opposition to the Cimos' mo-

tion. No final decision by the Bankruptcy Court had been rendered on petitioners' motion pursuant to §365(d)(4) or respondents' motion prior to the filing on May 23, 1986 by Petty of a Motion to Dismiss the pending chapter II proceeding which was set for hearing on June 26, 1986.

The Cimos filed an Opposition to the Debtor's Motion to Dismiss on June 13, 1986. The Cimos alleged in their opposition that the Debtor's Motion to Dismiss had been filed by Petty "... to defeat and/or circumvent the jurisdiction of the United States Bankruptcy Court for the Eastern District of Louisiana over the property of the debtor, including the leasehold interest in 520 St. Philip Street... ." The hearing on Petty's Motion to Dismiss was held on June 26, 1986, at which time the Bankruptcy Court still had not rendered a decision on the Cimos' Motion to Invoke Automatic Rejection.

At the hearing on Petty's Motion to Dismiss, the Cimos argued that Petty's bankruptcy should not be dismissed since their motion, filed prior to the Motion to Dismiss, was still under advisement. In response, the Bankruptcy Judge stated that he would remove this obsticle to dismissal by denying the Cimos' motion, because the Court opined that the automatic rejection provisions of 11 U.S.C. §365(d)(4) only applied to leases of commercial shopping center property. Consequently, on June 26, 1986 the Bankruptcy Court rendered two oral rulings. The Court denied the Cimos' Motion to Invoke Automatic Rejection, while it granted Petty's motion to dismiss the bankruptcy proceedings. Counsel for the Cimos at the hearing orally requested that the Court render a written order confirming the denial of the Cimos' Motion to Invoke Automatic Rejection, so that an appeal might be taken. Counsel for the Cimos on that date prepared an appropriate order denying the Cimos' Motion to Invoke Automatic Rejection and

promptly submitted it to the Court to be signed. The order was rendered and signed on June 26, 1986, the same day of the above mentioned hearing. However, due to some administrative or clerical oversight, the order denying the Cimos' Motion was not entered into the record by the Clerk's office until July 16, 1986.

The record on appeal contains no copy of a written order signed by the Bankruptcy Court dismissing the Petty Chapter 11 bankruptcy. While the Bankruptcy Court made an oral ruling granting the Motion to Dismiss on June 26, 1986, only a Minute Entry dated July 2, 1986, and a subsequent entry of the Bankruptcy Court dated July 7, 1986, reflect the dismissal orally granted on June 26, 1986. Therefore, the record does not contain a written order of dismissal which was signed or entered, as required by Bankruptcy Rule 9021 and Rule 58 of the Federal Rules of Civil Procedure.

II.

SUMMARY OF THE PROCEEDINGS ON APPEAL TO THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The absence of a written order of dismissal, as required by Bankruptcy Rule 9021, arguably indicates that no "effective" order of dismissal was ever rendered in this case. Nevertheless, the Cimos, in their appeal to the United States District Court, discussed the issues presented under the assumption that a written order of dismissal had been entered by the Clerk of Court. On July 3, 1986, the Cimos filed a Notice of Appeal to the District Court, seeking reversal of both the order dismissing the bankruptcy and the order denying the Motion to Invoke Automatic Rejection.

In response to the Cimos' Notice of Appeal, M & M filed in July, 1986 a Motion for Partial Dismissal of Appeal, based on the allegation that no order denying the Cimos' Motion to Invoke Automatic Rejection had been entered. The debtor, Petty, did not respond to the Cimos' appeal. An additional Motion for Dismissal of Appeal and supporting memorandum were filed by M & M in October, 1986. Therein, M & M argued that the Cimos had acquiesced in the entry of the order of dismissal, despite the strenous objection to the dismissal by the Cimos in their written opposition and oral argument at the hearing on the Motion to Dismiss. M & M also argued that the Cimos' appeal was premature since the Notice of Appeal was filed prior to the entry of the Order denying the Cimos' Motion. M & M further argued that since the order of dismissal was entered by the Clerk of Court before the order denying the Cimos' Motion to Invoke Automatic Rejection, the District Court was divested of jurisdiction over the subject matter of the Cimos' appeal. M & M contended that because of a clerical or "housekeeping" error in the Bankruptcy Court, the Cimos should be deprived of the opportunity to assert their substantive legal rights on appeal. This was an opportunity that the Bankruptcy Court specifically agreed to preserve to the Cimos by signing a written order dated the same day of the hearing on the dismissal, confirming the Court's oral denial of the Motion to Invoke Automatic Rejection. M & M did not refer to Bankruptcy Rule 9021 or Rule 58 of the Federal Rules of Civil Procedure in either of the above mentioned motions.

The District Court denied M & M's motion to dismiss the Cimos' appeal of the Bankruptcy Court's Order denying their motion to Invoke Automatic Rejection. The District Court specifically stated that it had jurisdiction over the appeal pursuant to 28 U.S.C. §158 and §1334. This effectively assured the Cimos of a forum in which to assert

their substantive rights on appeal. Additionally, the District Court dismissed the Cimos' appeal of the dismissal of the bankruptcy, since orders of dismissal are unreviewable under 11 U.S.C. §305(c). Thereafter, the District Court ruled against the Cimos on the substantive issue underlying their motion and appeal, holding that 11 U.S.C. §365(d)(4) does not apply to real estate in which human beings reside, e.g. tenants of the debtor, regardless of whether a lease of real property is held by the debtor for commercial purposes. Notwithstanding this contrary ruling, the District Court expressly left open an avenue of appeal on the merits of the case intentionally created by the Bankruptcy Court when it rendered and signed the order denying the Cimos' Motion on the same day of the hearing on the motion to dismiss the bankruptcy proceedings.

A timely appeal to the United States Court of Appeals for the Fifth Circuit was then filed by the Cimos. Neither Petty nor M & M appealed or raised any issue before the Fifth Circuit of the denial of the motions to dismiss the Cimos' appeal before the District Court. The original Brief of the Cimos filed with that Court argued that the Bankruptcy Court and the United States District Court erred on a matter of law in denying the Cimos' Motion to Invoke Automatic Rejection and holding that 11 U.S.C. §365(d)(4) does not apply to real property leased to a debtor-lessee, or held by a debtor-assignee, when the property that comprises the real property is an apartment complex used as residences by third parties, i.e., tenants of the debtor. The original Briefs filed on behalf of both the Cimos and M & M did not address the instant jurisdictional question raised by the fact that, although the Cimos' motion and Petty's Motion to Dismiss were decided in the Bankruptcy Court on the same day, a minute entry noting the granting of the motion to dismiss had been entered by the Clerk of Court prior to the entry of the written order

denying the Cimos' Motion. However, during oral argument before the Fifth Circuit, the Court sua sponte raised the issue of the jurisdiction of the Bankruptcy Court to enter the order denying the motion of petitioners, since the minute entry noting the dismissal of the bankruptcy proceedings had been entered prior to the entry of the order denying petitioners' motion to reject the unexpired lease. At the hearing the Court requested that supplemental briefs be submitted on the jurisdictional issue.

Supplemental Briefs on the jurisdictional issue were filed, and on July 7, 1988 the United States Court of Appeals for the Fifth Circuit rendered a decision dismissing the Cimos' appeal. In their opinion, the Fifth Circuit held that the Bankruptcy Court lacked jurisdiction to enter the order denying the Cimos' Motion to Invoke Automatic Rejection after the minute entry noting the dismissal of the bankruptcy proceedings had been entered, even though the order denying the Cimos' motion had been signed prior to the date of the minute entry noting the dismissal. In their opinion, the Fifth Circuit relied on *United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed. 2d 202 (1972), wherein this Honorable Supreme Court had instructed our courts to mechanically apply Rule 58 of the Federal Rules of Civil Procedure. *Id.* at 221-222, 93 S.Ct. at 1564-1565. Further, the Fifth Circuit referred to *Taylor v. Sterrett*, 527 F.2d 856 (5th Cir. 1976), wherein that Court had stated that a mechanical application of Rule 58 of the Federal Rules of Civil Procedure aids in avoiding uncertainty over the effective date of a judgment. The Fifth Circuit reasoned that because the dismissal of Petty's bankruptcy terminated the Bankruptcy Court's jurisdiction over the case, the dismissal mooted the Cimos' pending Motion to Invoke Automatic Rejection. This led the Fifth Circuit to hold that the Bankruptcy Court had no jurisdiction to enter the order denying the Cimos' Motion to Invoke

Automatic Rejection and dismissed the Cimos' Appeal.

In conclusion, the Fifth Circuit also referred to 11 U.S.C. §349, which describes the effect of a dismissal of a bankruptcy. Specifically 11 U.S.C. §349(b)(3) states that a dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." According to the Court the Bankruptcy Court's lack of jurisdiction to enter the July 16, 1986 order, which attempted to deny Cimos' §365(d)(4) motion, not only mandated the result of the Court's decision, but also the Court opined that it would be inconsistent with the language and express purpose of §349(b), by which Congress had sought to restore property rights to their pre-action status, if the court were to allow the §365(b)(4) motion to alter property rights after a dismissal. Consequently, the Court found support in §349(b) for its decision to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

I.

THE EFFECT AND MEANING OF BANKRUPTCY RULE 9021 AND RULE 58 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 58 of the Federal Rules of Civil Procedure provides that "... [e]very judgment shall be set forth on a separate document," and that "[a] judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 79(a) describes the ministerial duty of the Clerk of Court to enter all judgments chronologically on the civil docket, in a manner sufficient to reflect the substance of the order or judgment being entered. Bankruptcy Rule

9021 is derived from Rule 58 of the Federal Rules of Civil Procedure, and was amended in 1987 to incorporate explicitly the provisions of Rule 58.

The Fifth Circuit in the proceedings below relied on *Indrelunas* in support of its decision to apply Rule 58 mechanically, In that case, again, this Honorable Court had held that the separate document requirement in Rule 58 must be "mechanically applied" to determine whether an appeal is timely. *Indrelunas*, 411 U.S. at 221-222, 93 S.Ct. at 1564-1565. Therein, this Honorable Court had expressly rejected a "case by case tailoring" of the separate document requirement of Rule 58, because the Rule had been adopted to eliminate uncertainties as to what actions constitute an appealable entry of judgment. *Id.*

The *Indrelunas* case was followed by the Fifth Circuit in *Taylor v. Sterret*, 527 F.2d at 857-8, which was also relied upon by the Fifth Circuit in its opinion in this case. However, both of the cases cited by the Fifth Circuit preceded and were modified by *Bankers Trust Company v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed. 2d 357 (1978). In *Bankers Trust Company v. Mallis*, this Honorable Court stated that the *Indrelunas* case "should not prevent the parties from waiving the separate judgment requirement where one has accidentally not been entered." *Bankers Trust Company*, 435 U.S. at 386, 98 S.Ct. at 1120. This position was premised on this Honorable Court's declaration that Rule 58 "should be interpreted to *prevent the loss of the right to appeal, not to facilitate the loss of that right.*" *Id*, citing 9 J. Moore, Federal Practice, §58.05, §110.08[2], p.p. 119-120 (emphasis added). This Honorable Court further stated that where the District Court has clearly evidenced an intent that an order represents its final decision in a case, and neither party objects to the

lack of a separate judgment, the parties are presumed to have waived the requirements of Rule 58 and an appellate court may take jurisdiction over such a "final" judgment. *Bankers Trust Company v. Mallis*, 435 U.S. at 386, 98 S.Ct. at 1120.

In *Hanson v. Town of Flower Mound*, 679 F.2d 497 (5th Cir. 1982), the Fifth Circuit reconsidered its position on Rule 58 in light of the *Bankers Trust Company v. Mallis* case. The Fifth Circuit acknowledged that it had taken the "mechanical application" language, "perhaps too literally" in its previous rulings and similar cases, including *Tayor v. Sterrett*. *Hanson*, 679 F.2d at 500. The Fifth Circuit recognized that *Bankers Trust Company v. Mallis* represented an "overriding change in the law," and declared that it was from then on free to assume jurisdiction of an appeal from a "final decision" under 28 U.S.C. §1291, even though no separate, written judgment had been entered when the parties had not objected. *Id.* Indeed, in subsequent cases, the Fifth Circuit has consistently applied the ruling in *Bankers Trust Company v. Mallis*, and has accepted jurisdiction even though no separate judgment had been entered. *Nagle v. Lee*, 807 F.2d 435 (5th Cir. 1987); *Louisiana World Exposition v. Logue*, 746 F.2d 1033 (5th Cir. 1984); *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984).

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT

Your petitioners respectfully submit that the instant case falls squarely within the rationale underlying the *Bankers Trust Company v. Mallis* decision; and, that the Fifth Circuit decided the instant case in conflict with that

decision. The Bankruptcy Court clearly manifested an intent to render a final and appealable decision on the Cimos' Motion to Invoke Automatic Rejection as a separate order denying the Cimos' motion was signed and rendered on the same day as the hearing on the motion to dismiss. The order, however, was not entered into the record until July 16, 1986, due to a delay caused solely by the Bankruptcy Court or Clerk's Office of that Court. Upon the appeal to the District Court by the Cimos of the decision of the Bankruptcy Court, M & M did file a Motion for Partial Dismissal of Appeal and subsequently filed a Motion to Dismiss the Appeal. Nevertheless, neither of these motions contained an objection specifically based on noncompliance with Bankruptcy Rule 9021 or Rule 58 of the Federal Rules of Civil Procedure. The Debtor, Petty, did not even respond to the Cimos' appeal of the Bankruptcy Court decision to the District Court or to the Fifth Circuit. Thus, your petitioners respectfully submit that neither Petty nor M & M objected to the Cimos' appeal to the Fifth Circuit on the grounds that there had not been technical compliance with Bankruptcy Rule 9021 or Rule 58. Consequently, the District Court, as well as the Fifth Circuit, was free to assume jurisdiction of this appeal, under 28 U.S.C. §1291, even though the Bankruptcy Court's order was not timely entered by the Clerk of Court of the Bankruptcy Court.

In the Motion to Dismiss the Appeal to the District Court, M & M did include a loosely phrased objection based on the fact that the dismissal of the bankruptcy proceedings was entered into the record prior to the entry of the order denying the Cimos' motion. The District Court denied M & M's Motion to Dismiss, however, and M & M never appealed this decision by the District Court nor raised any issue with respect to the timeliness of the entry of the order on appeal to the Fifth Circuit. Therefore, petitioners alternatively submit that to the extent that M & M

raised any objection to jurisdiction in its Motion to Dismiss the Cimos' appeal before the District Court, M & M's failure to appeal the District Court's Order denying their Motion to Dismiss, and their failure to raise the issue in their original brief to the Fifth Circuit, constituted a waiver of any objection on the issue of noncompliance with Bankruptcy Rule 9021 or Rule 58 of the Federal Rules of Civil Procedure.

A waiver under these circumstances is tantamount to a failure to object at all to an assumption of jurisdiction, and the Fifth Circuit should have assumed jurisdiction pursuant to this Honorable Court's rationale outlined in *Bankers Trust Company v. Mallis.* Even assuming arguendo that a specific objection had been raised earlier, this Honorable Court's reasoning in *Bankers Trust Company v. Mallis* logically encompasses a waiver of a previously asserted objection to noncompliance with Rule 58 and Bankruptcy Rule 9021. Nevertheless, in the proceeding below, the Fifth Circuit raised the issue with respect to a Bankruptcy Rule 9021 technical deficiency, *sua sponte,* and not as a result any such objection raised in the brief by Petty or M & M before the Fifth Circuit. The Fifth Circuit's action in raising an issue abandoned by M & & on appeal does not rectify M & M's failure to raise the issue. Thus, the petitioners respectfully submit that the Fifth Circuit decided the instant case in conflict with the ruling enunciated in *Bankers Trust Company v. Mallis* despite that Court's consistent adherence to that decision in the past.

III.

THE SPLIT OF OPINION AMONG THE FEDERAL CIRCUITS AND THE NEED FOR EXTENDING THE RULE OF *BANKERS TRUST COMPANY v. MALLIS*

The petitioners further respectfully submit that if the motions filed by M & M with the District Court to dismiss the Cimos appeal could be construed to constitute an objection based on non-compliance with the technical requirements of Bankruptcy Rule 9021 and Rule 58, and that there was no waiver of this objection, that this Honorable Court should extend the rule enunciated in *Bankers Trust Company v. Mallis,* and encourage Courts to assume jurisdiction despite an objection to an appeal based on non-compliance with Rule 58 or Bankruptcy Rule 9021. In fact, other circuit courts of appeal have held that an appellate court may exercise jurisdiction over a final order that has not been entered in compliance with Rule 58 even though a respondent has objected to a Rule 58 deficiency. *International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Association,* 660 F.2d 76, 79-80 (3rd Cir. 1981); *Hummer v. Dalton,* 657 F.2d 621, 623-4 (4th Cir. 1981); *In Re Pacific Far East Line, Inc.,* 654 F.2d 664, 666 n.2 (9th Cir. 1981); *Leonhard v. United States,* 633 F.2d 599, 611-12 (2d Cir. 1980), cert. denied 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed. 2d 295 (1981). Accordingly, petitioners request that this petition be granted since a split of opinion exists in the federal circuit courts of appeal on the instant issue involving the effect of Rule 58 and, by implication, Bankruptcy Rule 9021. Petitioners respectfully request that this Honorable Court adopt the same rule, extending the *Bankers Trust Company v. Mallis* rule, as that adopted in the Second, Third, Fourth, and Ninth Circuits. As was apparently recognized in these cases, it would be fundamentally unfair to deny petitioners their right to appeal the Bankruptcy Court's denial of their motion simply because the Bankruptcy Court or Clerk's office improvidently delayed entry of the order prepared and signed the same day of the hearing to dismisss Petty's bankruptcy. U.S. Const. amend. V. It is especially unfair in light of the diligence displayed by the petitioners to preserve their

right to appeal, which the Bankruptcy Judge ostensibly sanctioned by signing a written order denying their motion under §365(d)(4). To deny the petitioners the right to appeal would be an injustice completely caused by an administrative oversight in the Clerk's Office or in the Bankruptcy Court, and beyond the control of the petitioners. Moreover, the petitioners request that this Honorable Court reverse this decision in order to prevent the use of procedural rules to deny them substantive rights sought to be protected by those very rules, and in contravention of the philosophy underlying the Federal Rules of Civil Procedure. Fed R. Civ. P. 1. For the foregoing reasons, the Cimos respectfully request that this Court grant this Writ to extend the holding of *Bankers Trust Company v. Mallis* and adopt the position of other federal circuits on the meaning and effect of Rule 58, and consequently of Bankruptcy Rule 9021. *International Brotherhood of Teamsters*, 660 F.2d at 79-90; *Hummer*, 657 F.2d at 623-4; *Pacific Far East Line, Inc.*, 654 F.2d at 666 n.2; *Leonard*, 633 F.2d at 611-12.

IV.

THE EFFECT OF DISMISSAL UNDER 11 U.S.C. §349(b) ON THE AUTOMATIC REJECTION PROVISION OF 11 U.S.C. §365(d)(4)

Even if an order of dismissal were entered and terminated the bankruptcy proceedings, a question still arised whether a dismissal would nullify the effect of an automatic rejection of an unexpired lease of nonresidentialed property under 11 U.S.C. §365(d)(4). While the dismissal of a bankruptcy pursuant to 11 U.S.C. §349 is designed to restore all property rights of the debtor, as far as practicable, to the positions they occupied at the inception of the case, the Court is permitted to order a different result, and the cases have noted exceptions to this broad statement of the restoration of property rights as

they existed prior to the bankruptcy. 11 U.S.C. §349(b)(3) expresses the general rule that a bankruptcy dismissal revests the property of the banktruptcy estate in the entity in which it was vested prior to the bankruptcy. The question that arises under this section is whether this general rule applies only to property remaining in the bankruptcy estate at the time of dismissal, or whether it also applies to property that has been distributed, transferred, or otherwise disposed of during the term of the bankruptcy. In *In Re Searles,* 70 B.R. 266 (D.R.I. 1987), the Court therein noted that the few cases that have addressed this question have concluded that 11 U.S.C. §349(b)(3) applies only to the restoration of property or property rights still remaining in the bankruptcy estate. 70 B.R. at 270. If a determination is made that the lease of the apartment complex in question is a lease of non-residential real property, the automatic rejection provision of 11 U.S.C. §365(d)(4) will in effect be rendered operative since Petty failed to assume the lease within sixty (60) days as prescribed by that section. Such a holding would have the retroactive effect of divesting Petty of his leasehold interest when he failed to assume the lease as prescribed by 11 U.S.C. §365(d)(4). If applicable in this case, the automatic rejection would have occurred prior to the dismissal of the bankruptcy by operation of law, and the leasehold interest would have to be considered property that had already passed out of the bankruptcy estate by operation of law prior to the dismissal. Consequently, since the leasehold was no longer part of the estate, the dismissal would not have any effect on the divestiture of the leasehold nor operate to revest the leasehold interest in the debtor.

One reported case addressed the interplay between an 11 U.S.C. §349 dismissal and divestiture of the lessee's leasehold interest under 11 U.S.C. §365(d)(4). In that case, *In Re BSL Operating Corp.,* 57 B.R. 945 (S.D.N.Y. 1986), the lessee's second Chapter 11 bankruptcy case was

dismissed on January 28, 1985. The lessee, Taverns, prior to dismissal had failed to assume a commercial lease within the 60-day time period mandated by 11 U.S.C. §365(d)(4). BSL, the lessor, and debtor in a subsequent bankruptcy, filed an adversary proceeding in its bankruptcy seeking turnover of the lease on the basis of the lessee's failure to assume the lease in its bankruptcy. The Court concluded that the lease would, as a consequence of Taverns' failure to assume, be deemed to have been rejected by operation of law. The Court expressly rejected Taverns' argument that the dismissal of its case on January 28, 1985 revested the rejected lease in the lessee. The Court noted that the construction of 11 U.S.C. §349 urged by Taverns would utterly defeat the intention of 11 U.S.C. §365(d)(4). The Court, preferring to harmonize the two sections, stated:

> "In light of the flexibility inherent in §349, §365(d)(4) must be given effect in such a way as to prevent a lessee's bankruptcy from holding a non-debtor lessor hostage to repeated filings." 57 B.R. at 952.

The Court then held that the §365(d)(4) divestiture of Tavern's leasehold interest had occurred immediately at the expiration of the 60-day period by operation of law. As the Court stated:

> "Having availed itself of the protection offered by the code and the automatic stay by filing the 1984 case, Taverns cannot now be heard to complain because the operation of other code provisions and its own inaction resulted in a loss of the lease." *Id.*

The Court characterized a dismissal under 11 U.S.C. §349 as a "two-edged sword". *Id.* While it operates to restore property rights to their initial position, it also enables the Court to "order otherwise for cause". *Id.*

The reasoning employed by the Court in the *BSL* case is directly applicable to the case before this Court. Indeed, the only distinction between the two cases is that in the *BSL* case, the Bankruptcy Court held in favor of the lessor on the issue of whether 11 U.S.C §365(d)(4) applied. However, the Court was not inclined to reach back into the bankruptcy proceedings of the lessee which had been assigned to another Judge, for the purpose of directly ordering the lease rejected and dispossessing the lessee; the Court felt that function was better left to a state court as a consequence of the Court's determination of the non-existence of the lease under the facts of the case.

In the present case, the District Court and the Bankruptcy Court have held that 11 U.S.C. §365(d)(4) did not apply to the lease at issue in this case. Should a determination be made that 11 U.S.C. §365(d)(4) does in fact apply, Petty should be deemed to have rejected the lease in question at the expiration of the 60-day time limit imposed by 11 U.S.C. §365(d)(4). Petty further should be deemed to have been divested of his leasehold interest by operation of law prior to the order of dismissal. Therefore, in the instant case, the order of dismissal should not, under the rationale of *In Re Scarles* and the *BSL Operating Corp.* case, operate to revest Petty with the lease under the authority of 11 U.S.C. §349. The construction of 11 U.S.C. §349 adopted by the Fifth Circuit, petitioners respectfully submit, utterly defeats the intention of 11 U.S.C. §365(d)(4), and would render it ineffective by any debtor who failed to assume an unexpired lease of non-residential real property, and then moved to dismiss its bankruptcy proceeding pursuant to 11 U.S.C §349.

Finally, it should be noted that 11 U.S.C. §349(b) begins with the proviso "[u]nless the Court, for cause, orders otherwise, . . .".The legislative histsory of this statute elaborates on this as follows:

> "The Court is permitted to order a different result for cause. The basic purpose of this subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. . . . *where there is a question over the scope of the subsection, the Court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.*"
> H. Rep. No. 95-595, p. 338, reprinted in 1978 U.S. Code Cong. and Admin. News, 5787, 5835. (emphasis added).

In the case before this Court, petitioners respectfully submit, the Bankruptcy Court acted to "protect the rights acquired in reliance on the bankruptcy case" by signing, at the Cimos' request, a written order denying the Cimos' Motion to Invoke Automatic Rejection. In this manner, the Court secured the Cimos' right to appeal the Bankruptcy Court's order, and the District Court, in accepting jurisdiction over the issue raised by the Cimos' appeal, acted in furtherance of the protection of that right. The Cimos now urge this Court to grant this Petition so that the merits of their appeal on the issue of the applicability of 11 U.S.C. §365(d)(4) can be ultimately addressed. This is an issue of much significance in a new area of bankruptcy practice brought on by the 1984 amendments to §365, which has not been, but should be, addressed by our federal appellate courts. If this Court so declines, the valuable rights which would obtain on behalf of the Cimos, and other similarly situated litigants, in the event of a favorable ruling on the merits of their Motion to Invoke Automatic Rejection, will be forever lost.

V

THE CONTINUING JURISDICTION OVER THE ISSUE AS TO WHETHER THERE WAS AN AUTOMATIC REJECTION OF THE LEASE UNDER 11 U.S.C. §365(d)(4)

While, as a general rule, the dismissal of a bankruptcy case results in the dismissal of all remaining proceedings, the few courts which have considered the issue have concluded that the dismissal of a bankruptcy case does not necessarily mandate dismissal of all pending proceedings. *In Re Stardust Inn, Inc.*, 70 B.R. 888, 890 (E.D. Pa. 1987); *In Re Pocklington*, 21 B.R. 199, 202 (S.D. Ca. 1982); *In Re Lake Tahoe Land Company, Inc.*, 12 B.R. 479, 480-481 (D. Nev. 1981). In *In Re Pocklington*, a Chapter 13 debtor moved to dismiss his case while a complaint for relief from the automatic stay filed by one of his creditors was still pending. The Court granted the debtor's dismissal, but retained jurisdiction over the proceeding pursuant to 11 U.S.C. §349. The Court reasoned that, while it was clear that the debtor had the absolute right to dismiss the case, it was also clear that the rights of his creditor would be prejudiced by dismissal of the adversary proceedings. In underscoring the prejudice that would result to the creditor, the Court pointed out that the bankruptcy statute dealing with dismissal, 11 U.S.C. §349, "... reserves to the Court the power to alter the normal effects of the dismissal of the bankruptcy case if cause is shown." *Pocklington*, 21 B.R. at 202. The Court also declared that there was nothing in 28 U.S.C. §1471, which grants broad jurisdiction to the Bankruptcy Courts, that would prohibit continuing jurisdiction over a proceeding which arose in or was related to a bankruptcy case, following a dismissal of the underlying bankruptcy case. *Id.* at 202-3. Consequently, the Court concluded that it was em-

powered to exercise continuing jurisdiction over the adversary proceeding by virtue of the text of 11 U.S.C. §349. *Id.*

The Bankruptcy Court in *In Re Pocklington* followed the line of reasoning set forth in *In Re Lake Tahoe Land Company, Inc.*, 12 B.R. 479 (S.D. Ca., 1982).In *Lake Tahoe*, the Court concluded that it had continuing jurisdiction over an adversary proceeding filed by a creditor in order to recover a deficiency judgment against the debtor. *Id.* at 480-1. By the time the debtor's Chapter 11 case was dismissed, the statute of limitations had run on the creditor's cause of action, thus barring the refiling of that action in state court. In maintaining its jurisdiction, the Court stated:

> "Once jurisdiction attached in this adversary action, reason and logic require that jurisdiction continue notwithstanding the dismissal of the underlying bankruptcy case."
> *Id.* at 480.

The concept of continuing jurisdiction affords the Court the opportunity to resolve matters arising in a bankruptcy proceding where judicial economy and fairness to the litigants favor the exercise of such jurisdiction. *In Re Stardust Inn, Inc.*, 70 B.R. at 891. As noted in *In Re Pocklington*, this jurisdiction emanates from 11 U.S.C. §349, which reserves to the Court the power to alter the normal effects of the dismissal of a bankruptcy case if cause is shown. 21 B.R. at 202. Consequently, even if the dismissal granted by the Bankruptcy Court in the present case was entered prior to the order denying the Cimos' Motion to Invoke Automatic Rejection, petitioners respectfully submit that, under 11 U.S.C. §349, the Bankruptcy Court was still empowered to issue its order denying the Cimos' motion, in order to protect the Cimos' right to ap-

peal the denial of that order, and assert on appeal their contention that the lease in question was deemed rejected. This is clearly a right that was acquired in reliance on the bankruptcy case and which the Bankruptcy Court obviously acted to preserve. This Honorable Court has not yet addressed this issue, and guidance by this Honorable Court is needed for litigants. Therefore, the petitioners herein request, in consideration of the foregoing, that this Honorable Court grant their Petition, so that their rights and those of future litigants may be protected.

CONCLUSION

Bankruptcy Rule 9021 and Rule 58 of the Federal Rules of Civil Procedure provide a practical guideline as to the timeliness of appeals determined by the time a judgment or decision is entered into the record. However, occasions arise when a separate document evidencing a final decision is not entered into the record. This Honorable Court has recognized that in such a case, the right to appeal still exists if the Court making the initial decision manifests a clear intent that its order is final and appealable and no party objects to the appeal due to the lack of a separate judgment. "[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Bankers Trust Company v. Mallis*, 435 U.S. at 386, 98 S.Ct. at 1121 (citation omitted). Petitioners respectfully submit that no objection specifically based on technical noncompliance with Bankruptcy Rule 9021 or Rule 58 was raised by the respondents in the proceedings below before the Fifth Circuit. Consequently, petitioners respectfully submit that this Honorable Court's directive was thwarted by the Fifth Circuit in the proceeding below, since that Court failed to

adhere to the guiding principles of that case. Alternatively, even if this Honorable Court deems that such an objection was adequately raised at the District Court level, petitioners submit that this objection was waived on appeal to the Fifth Circuit, since the respondents failed to raise the issue or appeal the District Court's denial of the motions to dismiss the Cimos' appeal.

Furthermore, even if the motions to dismiss the Cimos' appeal are construed as containing an objection based on noncompliance with Bankruptcy Rule 9021 (Rule 58), and that no waiver of this objection occurred, petitioners request this Honorable Court to grant their petition, so that the rule of *Bankers Trust Company v. Mallis*, can be extended to include situations such as in the present case and allow an appeal to be taken despite objections based on administrative errors that occur from time to time. Such a rule would be consistent with the jurisprudence on this issue of other federal circuit courts of appeal. Uniform application of these Rules by the federal courts of appeals is needed and desirable for litigants. In granting this Writ of Certiorari, the integrity of Bankruptcy Rule 9021 and Rule 58 of the Federal Rules of Civil Procedure, and the relevant and current jurisprudence thereunder, will be preserved and reinforced, the right to appeal facilitated and protected, and procedural fairness will be accorded to appropriate parties, such as the petitioners, Lucy M. Cimo, Widow of Henry J. Cimo, et al.

Further, even if the dismissal was entered prior to the order dispositive of the Cimos' motion, petitioners respectfully submit that, if found applicable, the automatic rejection provisions of 11 U.S.C. §365(d)(4) operated to effect a divestiture of the respondent's interest in the lease by operation of law well before the dismissal. The interpretation of the interplay between 11 U.S.C. §349 and 11

U.S.C. §365(d)(4) by the Fifth Circuit would render the effect and efficacy of 11 U.S.C. §365 (d)(4) nugatory and requires the review of this Honorable Supreme Court. The construction of 11 U.S.C. §349 adopted by the Fifth Circuit would utterly defeat the intention of 11 U.S.C. §365 (d)(4) and would render it ineffective by any debtor who failed to assume an unexpired lease of non-residential real property, and then moved to dismiss its bankruptcy proceeding pursuant to 11 U.S.C. §349. Moreover, it would in essence revest the debtor with property which had been divested and otherwise disposed of during the term of a bankruptcy proceeding contrary to the express language of 11 U.S.C. §349.

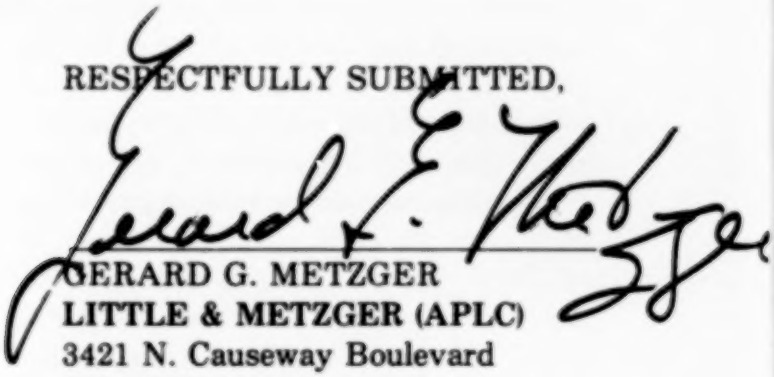
Finally, your petitioners respectfully submit that 11 U.S.C. §349(b) allows Bankruptcy Courts to retain continuing jurisdiction over pending proceedings after a dismissal occurs, and thus the Bankruptcy Court below had jurisdiction to enter the order which provided the basis for the subsequent appeals by the petitioners.

These issues are significant ones in federal and bankruptcy procedure and under the Bankruptcy Code, which require the attention of this Honorable Court for their review and resolution. Indeed, without such review, the procedural and substantive issues will remain unclear in view of the jurisprudence, and litigants will be without sufficient guidance to assess their right to appeal and substantive rights under the Federal Bankruptcy Code.

For the foregoing reasons, your petitioners pray that this Honorable Supreme Court grant the requested Writ of Certiorari to the Court of Appeals for the Fifth Circuit.
Date: October 10, 1988

New Orleans, Louisiana

RESPECTFULLY SUBMITTED,



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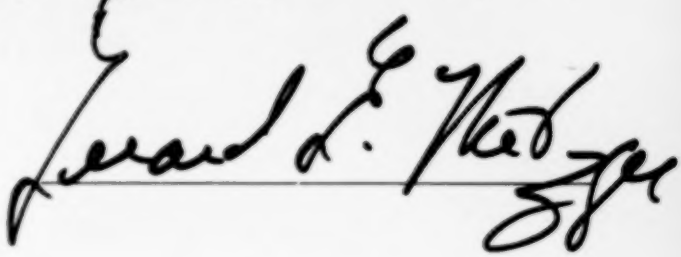
Attorneys for the Petitioners,
Lucy M. Cimo, Widow of
Henry J. Cimo, et al

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari have been duly served upon each of the respondents herein by depositing three (3) copies of same addressed to each of the counsel of record for the respondents in the United States mail, First Class, postage prepaid, this 1st day of November, 1988.



APPENDIX A

In The Matter of
Terry Don PETTY, Debtor.

Lucy M. CIMO, Widow of Henry J. Cimo, et al., Appellants,

v.

Terry Don PETTY, and M & M Partnership, Apellees.

No. 87-3597.

United States Court of Appeals,
Fifth Circuit

July 7, 1988.

On appeal from order of the United States District Court for the Eastern District of Louisiana, Marcel Liviaudais, Jr., J., holding that automatic rejection provisions of Bankruptcy Code did not apply to leases of apartment buildings, the Court of Appeals, Clark, chief Judge, held that dismissal of bankruptcy petition terminated Bankruptcy Court's jurisdiction over case and effectively mooted pending motion to invoke automatic rejection provisions, and Bankruptcy Court thererfore lacked jurisdiction to enter order denying motion that had been signed prior to dismiassal of petition.

Appeal dismissed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge,GOLDBERG and GARWOOD, Circuit Judges.

CLARK, Chief Judge:

Lucy Cimo appeals from the district court's holding that the automatic rejection provisions in 11 U.S.C. § 365(d)(4) do not apply to leases of apartment buildings. We dismiss the appeal.

I

On September 17, 1985 Terry Don Petty filed a voluntary petition for discharge in bankruptcy in the United States Bankruptcy Court for the Eastern District of Louisiana. Petty's listed assets included a lease of rental apartments owned by Lucy Cimo. Cimo moved to invoke the automatic rejection provisions of 11 U.S.C. § 365(d)(4). Cimo contended that the apartment complex lease was covered by § 365(d)(4). She requested that the bankruptcy court declare the lease had been rejected and requested that the court order Petty to surrender the premises to her.

Petty subsequently moved to dismiss the entire bankruptcy proceeding. Cimo opposed the motion to dismiss and urged the court to grant her § 365(d)(4) motion. After a hearing on June 26, 1986, the court granted Petty's motion to dismiss. An order dismissing the proceeding was entered on July 2, 1986. An order denying Cimo's § 365(d)(4) motion was subsequently entered on July 16, 1986. this order, however, had been signed on June 26, 1986, the day of the hearing on the motion to dismiss. Cimo appealed both the dismissal and the denial of her § 365(d)(4) motion to the district court.

The district court dismissed Cimo's appeal of the bankruptcy court's dismissal as unreviewable pursuant to 11 U.S.C. §305(c), but heard Cimo's appeal with respect to the § 365(d)(4) motion. The district court held that § 365(d)(4) did not apply to leases of apartment buildings.

Cimo now appeals only the district court's ruling concerning the applicability of § 365(d)(4).

II

The bankruptcy court had no jurisdiction in this proceeding on July 16, 1986 when it entered the order denying Cimo's motion under § 365(d)(4) because the court had previously entered an order dismissing the case on July 2, 1986. Rule 9021 states that a judgment becomes effective when it is entered. Fed.R.Bank.P. 9021. Rule 9021 is derived from Rule 58 of the Federal Rules of Civil Procedure.[1] Advisory Notes to Rule 9021. The Supreme Court had admonished courts to apply Rule 58 "mechanically." *United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973). The mechanical application of this rule helps avoid the uncertainty over the effective dates of judgments. *Taylor v. Sterrett*, 527 F.23d 856 (5th Cir. 1976).

Title 11 U.S.C. § 349 describes the effect of dismissal in a bankruptcy case. Subsection (b)(3) states that a dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." Congress designed § 349(b) to "undo the bankruptcy case," restoring property rights to their pre-cause status. S. Rep. No. 95-989, 95th Cong. 2d Sess. 48-49 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5835.

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[1] On August 1, 1987 rule 9021 was amended to explicitly incorporate Rule 58.

The dismissal of Petty's bankruptcy petition, which was effective on July 2, 1986 when the order of dismissal was entered, terminated the bankruptcy court's jurisdiction over the case. The dismissal of the action effectively mooted Cimo's pending § 365(d)(4) motion. Therefore, the bankruptcy court lacked jurisdiction to enter the July 16, 1986 order which attempted to deny Cimo's § 365(d)(4) motion. Not only is this result mandated by Rule 9021, but also it would be inconsistent with the language and express purpose of § 349(b), by which Congress sought to restore property rights to their pre-action status, if we were to allow the § 365(d)(4) motion to alter property rights after the dismissal.

The appeal is

DISMISSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3597

FILED
AUG 10 1988

IN THE MATTER OF:

TERRY DON PETTY,
Debtor,

LUCY M. CIMO, WIDOW OF HENRY J. CIMO, ET AL.,
Appellants,

versus

TERRY DON PETTY, and
M & M PARTNERSHIP,
Appellees.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Eastern District of Louisiana

- - - - - - - - - - - - -

ON PETITION FOR REHEARING
(AUGUST 10, 1988)

Before CLARK, Chief Judge, GOLDBERG and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing

filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

illegible

Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
JULY 27 1987

IN RE:
TERRY DON PETTY
BANKRUPTCY NUMBER
85-02370-B

CIVIL ACTION
NO. 86-3398

SECTION: E/6

ORDER and REASONS

Appellants Lucy M. Cimo, widow of Henry J. Cimo, et al., have appealed from an order of the Bankruptcy Court denying their motion to invoke automatic rejection of a lease under 11 U.S.C. § 365 (d) (4), as amended. This Court has jurisdiction pursuant to 28 U.S.C. § 158 and § 1334.

FACTUAL BACKGROUND

Henry and Lucy Cimo leased real property consissting of rental apartments located at 520 St. Philip Street, New Orleans, Louisiana, to Ray L. Peacock and John C. Fenasci; the lease commenced on September 1, 1973 and was to run for fifty years. It included the right of sub-lease. (Plaintiff's Exhibit 1). Upon the death of Henry Cimo, his succession was judicially opened, placing his direct descendants in possession as naked owners and recognizing the interest of his widow, Lucy M. Cimo, as co-owner and unsufructuary of the property. The lessors, therefore, are Mrs. Cimo and the naked owners of the property.

DATE OF ENTRY JUL 27 1987

During 1979 and 1980, a series of sub-leases were executed. the property passed from Peacock and Fenasci to Donald S. Moffatt, Durel Matherne, Jr., and his wife Nancy Torres; from them to Gregory Fuselier; and from him to Terry Don Petty and his former wife, Kathleen Furlow.

On September 17, 1985, Terry Don Petty filed a Chapter 13 bankruptcy proceeding. On the debtor's motion, it was converted to Chapter 11 on October 16, 1985. The debtor moved to assume the lease of the St. Philip Street apartments on January 30, 1986. The Cimos filed a motion in the bankruptcy proceeding to invoke the automatic rejection provisions of 11 U.S.C.§ 365 (d) (4), and to have the Bankruptcy Court declare the subject lease deemed rejected, because the debtor had not moved to assume the lease within sixty days. The Bankruptcy Court denied the Cimos' motion; they have appealed that denial.

ANALYSIS

The provision of the bankruptcy code under which the Cimos seek to deem the lease rejected, 11 U.S.C. §365 (d) (4), reads as follows:

> (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of *nonresidential* real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such *nonresidential* real property to the lessor.

(Emphasis added)

This subsection stands in contrast to § 365 (d) (2), which provides that the trustee in a Chapter 11 or 13 bankruptcy may assume or reject "an unexpired lease of *residential* real property . . . of the debtor at any time before the confirmation of a plan" unless the court sets a deadline for the trustee.

The appellants contend that the apartment complex on St. Philip Street falls into the category of property covered by § 365 (d) (4), and that therefore because more than sixty days passed before Petty moved to assume the lease, the latter must automatically be deemed rejected. The Bankruptcy Court rejected the Cimos' first premise, as does this Court. The transcript of the hearing below indentifies the property as an apartment complex. (Tr., p. 6). the language of the statute, the legislative history of the amendment, and judicial decisions all indicate that § 365 (d) (4) does not apply to property on which human being live.

The appellants would categorize Petty's lease as a "non-residential lease" — a term which makes no grammatical sense and does not appear in the statute. The statute uses the adjective "nonresidential"to modify the term "real property," not the term "lease". It is not the fact that the debtor is attempting to profit from the use of the property, but the use itself, that enables a lessor to invoke the automatic rejection provision of the bankruptcy code. A comment from Senator Orrin Hatch, made at the time the legislation was passed, sheds light on its rationale:

SHOPPING CENTER
BANKRUPTCY AMENDMENTS

Subtitle C of Title III, with the exception of a few minor changes, is identical to S. 549 which

was overwhelmingly approved by the committee and which unanimously passed the Senate in 1982 and 1983.

This subtitle contains three major substantive provisions which are *intended to remedy serious problems caused shopping centers and their solvent tenants by the administration of the bankruptcy code.*

The first problem which this bill would remedy is the long-term vacancy or partial operation of space by a bankrupt tenant. Although in a chapter 7 case the bankruptcy code presently requires that the trustee decide whether to assume or reject an unexpired lease within 60 days after the bankruptcy petition is filed, there is no deadline for this decision in a chapter 11 case. Because of the unprecedented numbers of bankruptcy cases and the consequential delays in the bankruptcy courts, tenant space has been vacated for extended periods of time before the bankruptcy court forced the trustee to decide whether to assume or reject the lease. During this time, the other tenants of the shopping center are hurt because of the reduced customer traffic in the shopping center. Tenants and landlords in other *nonresidential* structures have encountered similar problems.

The bill would lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject nonresidential real property lease within 60 days after the order for relief in a case under any chapter. This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases. One of the minor changes in

> this subtitle was *to limit it to nonresidential real property leases.* If the lease is not assumed or rejected within this 60-day period, or any additional period granted by the court the lease is deemed rejected and the trustee must immediately surrender the property to the lessor.
>
> 130 Cong. Rec. S. 8894-95 (daily ed. June 29, 1984) (statement of Sen. Hatch) (emphasis added).

Thus, the legislative history of the statute indicates that § 365 (d) (4) was aimed at solving the problems created for both landlords and other tenants when a business tenant went bankrupt, leaving an empty store behind for an indefinite period.

Cases interpreting the section, though sparse, are consistent. The Bankruptcy Court for the Eastern District of Michigan was faced with the question whether a debtor who did not move to assume a lease within sixty days could be deemed to have rejected it, when the subject property was a 252-unit facility providing homes for the elderly. *In re Independence Village, Inc.*, 52 B. R. 715 (1985). the court found that § 365 (d) (4) did not apply because "the lease in question deals with residential real property, that is, property in which human beings reside." *Id.* at 722. In *In re Gasoil*, 59 B.R. 804, 809 (Bkrtcy. N.D. Ohio 1986), the court deemed the oil and gas leases rejected by the debtor under § 365 (d) (4) only after determining that they were "not a lease of real property where human beings reside. Therefore, these leases are ones of nonresidential real property."

In the present case, the lease is one of an apartment complex, which, like the housing complex for the elderly in *In re Independence Village*, is used as residences. It is not nonresidential real property; therefore, the plain language

of the statute, its legislative history and case law all preclude applying § 365 (d) (4). That section does not create a time limit different from that in § 365 (d) (2) on assumption of leases of residential property by a debtor who does not himself reside on the property.

Accordingly,

IT IS ORDERED that the ruling of the Bankruptcy Court denying the motion of the Appellants, Lucy M. Cimo, widow of Henry J. Cimo, et al., to deem the lease of the real property lecated at 520 St. Philip Street, New Orleans, Louisiana, rejected by the debtor, Terry Don Petty, under 11 U.S.C. § 365 (d) (4) be AFFIRMED.

New Orleans, Louisiana, this 24 day of July, 1987.

/s/ Marcel Livaudais

MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX D

MINUTE ENTRY

FILED
FEB 11 87

LIVAUDAIS, JR.
FEBRUARY 10, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:
TERRY DON PETTY
BANKRUPTCY NUMBER
85-02370-B

CIVIL ACTION
NO 86-3398

SECTION: "E"

RULING ON MOTION

M & M Partnership, a party in interest in the bankruptcy, has filed a motion to dismiss two appeals by Lucy Cimo, et al: (1) an appeal from the dismissal of the bankruptcy petition; (2) an appeal from the denial of Cimo's motion to deem a lease rejected pursuant to 11 U.S.C.§ 365(d)(4). The motion of M & M Partnership was heard and submitted on a prior date.

Considering the motion, the memoranda of counsel, the record, and the law;

IT IS ORDERED that:

(1) The motion to dismiss the appeal of the bankruptcy court's dismissal of the bankruptcy petition is

GRANTED. Such orders are unreviewable, by appeal or otherwise, under 11 U.S.C. §305(c).

(2) The motion to dismiss the appeal of fthe bankruptcy court's order denying the motion of Cimo, et al to deem the lease rejected is DENIED.

DATE OF ENTRY FEB 12 1987

APPENDIX E

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

FILED
JUL 16 1988

IN RE: TERRY DON PETTY, Debtor	*	CASE NO. 85-02370 "B"
	*	CONTESTED MATTER
	*	No. 85-02370-B

* *

O R D E R

This cause came on for hearing on April 14, 1986, on the motion of Lucy Cimo, et al, to Lift Automatic Stay and /or for Adequate Protection and to Invoke Rejection and Have Lease Deemed heard the argument of counsel and being fully advised, it is

ORDERED that the motion of Lucy Cimo, et al, be and is hereby denied.

Dated **JUNE 26**, 1986.

/s/ T. M. Brahney, III
UNITED STATES BANKRUPTCY JUDGE

JUL 30 1986